RHB Bank Bhd v Kesatuan Eksekutif RHB Bank Bhd & Anor

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO 25–133–05 OF 2018
AZIZAH NAWAWI J
17 JULY 2019

Civil Procedure — Judicial review — Certiorari — Applicant applied for order of certiorari to quash award by Industrial Court — Whether bank's action fell within ss 4, 5 or 7 of the Industrial Relations Act 1967 — Whether there was evidence to prove allegations against bank — Whether there had been discrimination against members of Union — Whether Industrial Court erred in law with regards to issue of consultation and limited recognition — Industrial Relations Act 1967 ss 4, 5 & 7

This was an application for an order of certiorari to quash the Award No 462 of 2018 ('the award'). The applicant ('the bank') was a financial institution established and incorporated in 1994. The bank assumed its present name in 1997 and was part of the RHB Group of Companies ('RHB Group'). The first respondent was a trade union of employees ('the union') established and registered under the Trade Union Act 1959. In 2007, the RHB Group underwent a transformation, and with this the RHB Group and the bank had commenced the planning of another job grading and salary review to align all grade and salary structure across all entities within the group. The exercise began in 2010 and was completed in May 2011. On 9 March 2011, the union had submitted a claim for recognition under s 9 of the Industrial Relations Act 1967 ('the IRA 1967') with the Industrial Relations Department to represent employees who were engaged in the executive category ('claim for recognition') but the bank had refused the union's claim. Subsequently, recognition was granted to the union by the Director General of Industrial Relations ('the DGIR') under s 9 of the IRA 1967. By a letter dated 14 June 2011, the union raised a complaint with the DGIR under s 8 of the IRA 1967 and alleged that the bank had breached ss 4(1), 5(1), 6 and 7 of the IRA 1967. The bank responded to the union's complaint with the DGIR. Since both parties failed to reach amicable settlement during the conciliation meeting, the Minister of Human Resources referred the said dispute to the second respondent ('the Industrial Court') for adjudication pursuant to s 8(2A) of the IRA 1967. Upon hearing both parties, the Industrial Court had ruled in favour of the union and held that the bank had engaged in union busting action by implementing the new regrading and salary structure and had also discriminated the union members and union officials. The Industrial Court found that the bank had breached s 4(1), 5(1)(c) of the IRA 1967 and granted prayer of the union's claim. Being dissatisfied with the part of the award, hence the bank filed this

present judicial review application to challenge the award. The issues for consideration were: (a) whether the bank's action fell within ss 4, 5 or 7 of the IRA 1967; (b) whether there was evidence to prove the allegations against the bank; (c) whether there had been discrimination against members of the union; and (d) whether the Industrial Court erred in law with regards to the issue of consultation and limited recognition.

Held, allowing the application:

(1) The Industrial Court had made an error in its finding as the union's pleaded case was limited to s 5(1)(c) and (1)(e) of the IRA 1967. The Industrial Court had failed to confine itself to the pleadings, and by venturing into non-pleaded issue, the Industrial Court had erred in law and/or jurisdictional error. The Industrial Court merely made a finding of union busting and discrimination without any analysis of the elements in ss 4(1) and 5(1)(c) and (1)(d). The Industrial Court had failed to make any specific finding or reasoning as how and why the bank's actions amounted to a breach of the specific sections, namely ss 4(1), 5(1)(c) and (1)(d) or 7(c) of the IRA 1967 (see paras 27–28 & 30).

(2) The union had failed to adduce evidence to show that union members were indeed induced to cease to be members of union due to the re-grading structure and the new salary structure. The Industrial Court had erred in law when it took into account the irrelevant consideration on the purported decrease in the collection of union membership fees. The only legal document to prove union membership was the union's membership register. However, the union had failed to produce its membership register to show the actual number of members who resigned or left the union after the salary revision. Therefore, there was no evidence before the Industrial Court to prove that there was a different treatment between union members and non-union members and that the union members had left the membership of the union as a result of the bank's actions (see paras 36 & 38–40).

(3) The Industrial Court had erred in law as it failed to appreciate the legal requirement in s 5(1)(c) of the IRA 1967, that was, there must be evidence of discrimination in the salary structure and the promotion 'on the ground that he is or is not a member or officer of a trade union'. As the evidence showed that the bank did not have any knowledge as to who were members of the union, the bank's re-grading and new salary structure could not be said to be targeting the union members. The re-grading and new salary structure were done across the board within the RHB Group of Companies (see para 47).

(4) The issue of recognition was a separate issue from union busting, and that there was no legal requirement in ss 4 or 5 of the IRA 1967 which

mandated the Bank to consult the union which had not been duly recognised at the relevant time (see para 50).

[Bahasa Malaysia summary

Ini adalah permohonan untuk perintah certiorari untuk membatalkan Award No 462 tahun 2018 ('award'). Pemohon ('bank') adalah sebuah institusi kewangan yang ditubuhkan dan diperbadankan pada tahun 1994. Bank memegang nama sekarang pada tahun 1997 dan merupakan sebahagian daripada Kumpulan Syarikat RHB ('Kumpulan RHB'). Responden pertama adalah kesatuan sekerja pekerja ('kesatuan') yang ditubuhkan dan didaftarkan di bawah Akta Kesatuan Sekerja 1959. Pada tahun 2007, Kumpulan RHB telah menjalani transformasi, dan dengan ini Kumpulan RHB dan bank telah memulakan perancangan penarafan pekerjaan dan kajian semula gaji untuk menyelaraskan semua strata gred dan gaji ke seluruh entiti dalam kumpulan. Pelaksanaan ini bermula pada 2010 dan telah selesai pada bulan Mei 2011. Pada 9 Mac 2011, Kesatuan telah mengemukakan tuntutan untuk pengiktirafan di bawah s 9 Akta Perhubungan Perusahaan 1967 ('Akta') dengan Jabatan Perhubungan Perusahaan untuk mewakili pekerja yang telah terlibat dalam kategori eksekutif ('tuntutan untuk pengiktirafan') tetapi bank telah menolak tuntutan kesatuan. Selepas itu, pengiktirafan diberikan kepada kesatuan oleh Ketua Pengarah Perhubungan Perusahaan ('DGIR') di bawah s 9 Akta. Dengan surat bertarikh 14 Jun 2011, Kesatuan membuat aduan dengan DGIR di bawah s 8 Akta dan mendakwa bahawa bank telah melanggar ss 4(1), 5 (1), 6 dan 7 Akta. Bank membalas kepada aduan kesatuan dengan DGIR. Oleh kerana kedua belah pihak gagal mencapai penyelesaian yang baik dalam mesyuarat pendamaian, Menteri Sumber Manusia merujuk pertikaian tersebut kepada responden kedua ('Mahkamah Perindustrian') untuk adjudikasi berdasarkan s 8(2A) Akta. Selepas mendengar kedua pihak-pihak, Mahkamah Perusahaan telah memutuskan untuk memihak kepada Kesatuan dan berpendapat bahawa bank telah terlibat dalam tindakan 'union busting' dengan melaksanakan struktur penggreddan semula dan gaji dan juga mendiskriminasi anggota kesatuan dan pegawai kesatuan. Mahkamah Perindustrian mendapati bahawa bank telah melanggar ss 4(1), 5(1)(c) Akta dan membenarkan tuntutan Kesatuan. Tidak berpuas hati dengan sebahagian award itu, maka bank memfailkan permohonan semakan kehakiman ini untuk mencabar award. Isu-isu untuk pertimbangan adalah: (a) sama ada tindakan bank jatuh dalam ss 4, 5 atau 7 Akta; (b) sama ada terdapat bukti untuk membuktikan dakwaan terhadap bank; (c) sama ada terdapat diskriminasi terhadap anggota kesatuan; dan (d) sama ada Mahkamah Perusahaan terkhilaf dalam undang-undang berkaitan dengan isu perundingan dan pengiktirafan yang terhad.

Diputuskan, membenarkan permohonan:

(1) Mahkamah Perindustrian telah membuat kesilapan dalam penemuannya

kerana kes yang diplidkan oleh kesatuan adalah terhad kepada s 5(1)(c) dan (1)(e) Akta. Mahkamah Perindustrian telah gagal menghadkan diri kepada pliding dan dengan menyelami ke dalam isu yang tidak diplidkan, Mahkamah Perusahaan telah salah dalam undang-undang dan/atau kesalahan bidang kuasa. Mahkamah Perindustrian hanya membuat penemuan penyatuan dan diskriminasi kesatuan tanpa apa-apa analisis unsur-unsur dalam ss 4(1) dan 5(1)(c) dan (1)(d). Mahkamah Perindustrian telah gagal membuat apa-apa penemuan atau alasan tertentu seperti bagaimana dan mengapa tindakan bank adalah melanggar seksyen tertentu, iaitu ss 4(1), 5(1)(c) dan (1)(d) atau 7(c) Akta (lihat perenggan 27–28 & 30).

(2) Kesatuan telah gagal untuk memberi keterangan untuk menunjukkan bahawa ahli-ahli kesatuan sememangnya terpaksa untuk berhenti menjadi anggota kesatuan kerana struktur semula dan struktur gaji baru. Mahkamah Perindustrian telah menyalahi undang-undang apabila mengambilkira pertimbangan yang tidak relevan mengenai pengurangan dalam pengumpulan yuran keahlian kesatuan. Dokumen yang sah untuk membuktikan keanggotaan Kesatuan adalah daftar keahlian Kesatuan. Walau bagaimanapun, kesatuan telah gagal menghasilkan daftar keahliannya untuk menunjukkan bilangan sebenar ahli yang meletak jawatan atau meninggalkan kesatuan selepas penyemakan gaji. Oleh itu, tidak ada keterangan di hadapan Mahkamah Perusahaan untuk membuktikan bahawa terdapat perlakuan yang berbeza antara ahli kesatuan dan anggota bukan kesatuan dan bahawa anggota kesatuan telah meninggalkan keanggotaan Kesatuan akibat tindakan bank (lihat perenggan 36 & 38–40).

(3) Mahkamah Perusahaan telah terkhilaf dalam undang-undang kerana ia gagal menghargai keperluan undang-undang dalam s 5(1)(c) Akta, iaitu, mesti terdapat keterangan diskriminasi dalam struktur gaji dan kenaikan pangkat 'dengan alasan bahawa dia adalah atau bukan ahli atau pegawai kesatuan sekerja'. Memandangkan keterangan menunjukkan bahawa bank tidak mempunyai pengetahuan mengenai siapa ahli kesatuan, struktur penggredan semula dan gaji baru bank tidak dapat dikatakan menjadi sasaran ahli kesatuan. Struktur penggredan semula dan gaji baru dilakukan di seluruh lembaga dalam Kumpulan Syarikat RHB (lihat perenggan 47).

(4) Isu pengiktirafan adalah satu isu yang berasingan daripada 'union busting', dan tidak ada keperluan undang-undang dalam ss 4 atau 5 Akta yang memberi mandat kepada bank untuk merujuk kepada Kesatuan yang tidak diakui sewajarnya pada masa yang relevan (lihat perenggan 50).]

Cases referred to

Booi Kim Lee v Menteri Sumber Manusia & Anor [1999] 3 MLJ 515, HC (refd)
Council of Civil Service Unions and others v Minister for the Civil Service [1984] 3 All ER 935; [1985] AC 374, HL (refd)
Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1; [2010] 8 CLJ 629, FC (refd)

Legislation referred to

Industrial Relations Act 1967 ss 4, 4(1), 5, 5(1), (1)(c), (1)(e), 6, 7, 7(c), 8, 8(2A), s 9
Trade Unions Act 1959

N Sivabalah (Shearn Delamore & Co) for the applicant.
Azmer bin Md Saad (Hafizah bt Ahmad Osman with him) (Lainah Yaacob & Zulkepli) for the first respondent.

Azizah Nawawi J:

APPLICATION

[1] This is an application for an order of certiorari to quash the Award No 462 of 2018 dated 28 February 2018 ('the award').

[2] Having considered the application and the submission of the parties, this court has allowed the application with no order as to costs.

THE SALIENT FACTS

[3] The applicant ('bank') is a financial institution established and incorporated in 1994. The bank assumed its present name in 1997 and is part of the RHB Group of Companies ('RHB Group').

[4] The first respondent is a trade union of employees ('the union') established and registered under the Trade Unions Act 1959. The union is an in-house union of employees which was established to represent the executives of the bank in Grade E–E4, save for those who are engaged in the management, confidential or security capacity.

[5] Since its inception, the bank has been reviewing its job grading and salary structure from time to time to ensure that its human resources structure remain relevant and competitive.

[6] In 2007, the RHB Group underwent a transformation, and with this the RHB Group and the bank had commenced the planning of another job

grading and salary review to align all grade and salary structure across all entities within the group. The exercise began in 2010 and was completed in May 2011 ('job grading and salary review exercise').

[7] Prior to the job grading and salary structure review exercise, the bank's job grading structure were as follows:

RHB Bank/Islamic Bank

Grade	Corporate Title
8	Executive Vice President
7	Senior Vice President
6	Vice President
5	Assistant Vice President
4	Senior Manager
3	Manager
2	Senior Executive
1	Executive

[8] Pursuant to the job grading and salary structure review exercise, the RHB Group had adopted the following new grading structure:

Employee Level		RHB Grade	Corporate Title
Top Mgmt		R15	GMD
		R14	Director
		R13	
Senior Mgmt	Subject Matter Expert	R12	Executive Vice President
		R11	Senior Vice President
		R10	
Middle Mgmt	Senior Specialist	R9	Vice President
		R8	
Junior Mgmt	Specialist	R7	Assistant Vice President
		R6	Senior Manager
		R5	
Junior Mgmt / Supervisor		R4	Manager
		R3	Assistant Manager
Executive		R2	Senior Executive
		R1	Executive

[9] On 9 March 2011, the union had submitted a claim for recognition under s 9 of the Industrial Relations Act 1967 ('the IRA 1967') with the Industrial Relations Department to represent employees who are engaged in

the executive category from Band E1–E4 ('claim for recognition'). By a letter dated 30 March 2011, the bank had refused the union's claim for recognition. Subsequently, recognition was granted to the union by the DGIR under s 9 of the IRA.

[10] By a letter dated 14 June 2011, the union raised a complaint with the Director General of Industrial Relations ('DGIR') under s 8 of the IRA and alleged that the bank had breached ss 4(1), 5(1), 6 and 7 of the IRA 1967 in respect of the following matters:

(a) the change of the grade of executives from Grade 1–4 to Band R1–R6;

(b) the alleged discrimination towards members and officials of the union; and

(c) the issue of trade union leaves.

[11] By a letter dated 12 July 2011, the bank responded to the union's complaint with the DGIR.

[12] Since both parties failed to reach amicable settlement during the conciliation meeting, the Minister of Human Resources referred the said dispute to the second respondent ('Industrial Court') for adjudication pursuant to s 8(2A) of the IRA 1967.

[13] Upon hearing both parties, the Industrial Court had ruled in favour of the union and held that the bank had engaged in union busting action by implementing the new regrading and salary structure and had also discriminated the union members and union officials. The Industrial Court finds that the bank had breached ss 4(1), 5(1)(c) of the IRA 1967 and granted prayer (a) and (c) of the union's claim.

[14] Being dissatisfied with the part of the said award, hence the Bank filed this present judicial review application to challenge the said award.

THE FINDINGS OF THE COURT

[15] The Federal Court in *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 629 has set out the function of the court in an application for judicial review and the correct test to be applied in reviewing the findings of the Industrial Court, to be as follows:

> [15] ... Historically, judicial review was only concerned with the decision making process where the impugned decision is flawed on the ground of procedural impropriety. However, over the years, our courts have made inroad into this field of administrative law. Rama Chandran is the mother of all those cases. *The Federal*

Court in a landmark decision has held that the decision of inferior tribunal may be reviewed on the grounds of 'illegality', 'irrationality' and possibly 'proportionality' which permits the courts to scrutinize the decision not only for process but also for substance. It allowed the courts to go into the merit of the matter. Thus, the distinction between review and appeal no longer holds.

[16] The *Rama Chandran* decision has been regarded or interpreted as giving the reviewing court a license to review without restrain decisions for substance even when the said decision is based on finding of facts. However, post *Rama Chandran* cases have applied some brakes to the courts' liberal approach in *Rama Chandran*. The Federal Court in the case of *Kumpulan Perangsang Selangor Bhd v Zaid Noh* [1997] 1 MLJ 789; [1997] 2 CLJ 11 after affirming the *Rama Chandran* decision held that there may be cases in which for reason of public policy, national interest, public safety or national security the principle in *Rama Chandran* may be wholly inappropriate.

[17] The Federal Court, in *Petroliam National Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288; [2003] 4 CLJ 625, again held that the reviewing court may scrutinise a decision on its merits but only in the most appropriate of cases and not every case is amenable to the *Rama Chandran* approach. Further, it was held that a reviewing judge ought not to disturb findings of the Industrial Court unless they were grounded on illegality or plain irrationality, even where the reviewing judge might not have come to the same conclusion.

[18] The Court of Appeal has in a number of cases held that where finding of facts by the Industrial Court are based on the credibility of witnesses, those findings should not be reviewed (see *William Jacks & Co (M) Sdn Bhd v S Balasingam* [2000] 7 MLJ 1; [1997] 3 CLJ 235, *National Union of Plantations Workers v Kumpulan Jerai Sdn Bhd, Rengam* [2000] 2 MLJ 144; [2000] 1 CLJ 681, *Quah Swee Khoon v Sime Darby Bhd* [2000] 2 MLJ 600; [2001] 1 CLJ 9, *Colgate Palmolive (M) Sdn Bhd v Yap Kok Foong and another appeal* [2001] 4 MLJ 97; [2001] 3 CLJ 9. However, there are exceptions to this restrictive principle where:

(a) reliance upon an erroneous factual conclusion may itself offend against the principle of legality and rationality, or

(b) there is no evidence to support the conclusion reached.

(See *Swedish Motor Assemblies Sdn Bhd v Haji Md Ison bin Baba* [1998] 2 MLJ 372; [1998] 3 CLJ 288).

[19] It is clear from the above authorities that the scope and ambit of *Rama Chandran* had been clearly explained and clarified. Decided cases cited above have also clearly established that where the facts do not support the conclusion arrived at by the Industrial Court, or where the findings of the Industrial Court had been arrived at by taking into consideration irrelevant matters, and had failed to consider relevant matters into consideration, such findings are always amendable to judicial review. (Emphasis added.)

[16] In *Booi Kim Lee v Menteri Sumber Manusia & Anor* [1999] 3 MLJ 515, Justice KC Vohrah adopted Lord Diplock's classification of grounds of judicial

review in the House of Lords case of *Council of Civil Service Unions and others v Minister for the Civil Service* [1984] 3 All ER 935; [1985] AC 374. The three grounds described by Lord Diplock are:

(a) illegality;

(b) irrationality; and

(c) procedural impropriety.

[17] By illegality as a ground for judicial review, it means 'that the decision-maker must correctly understand the law that regulates his decision-making power and must give effect to it' and that '... the authority concerned has been guilty of an error of law in its action as for example, purporting to exercise a power which in law it does not possess'.

[18] By irrationality it means '*Wednesbury* unreasonableness' and 'applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided upon could have arrived at it'.

[19] By procedural impropriety, it includes 'failure by an administrative tribunal to observe procedural rules that are expressly laid out ...' and 'duty to act fairly'.

[20] Bearing in mind the above principles, I will deal with the following issues raised by the bank:

(a) that the Industrial Court erred in law when it failed to consider whether the bank's action fall within ss 4, 5 or 7 of the IRA 1967;

(b) that the Industrial Court erred in law when it failed to consider that the union had failed to prove the allegations against the bank;

(c) that the Industrial Court erred in law in holding that there was discrimination; and

(d) that the Industrial Court erred in law with regards to the issue of consultation and limited recognition.

[21] In the award, the Industrial Court had identified two issues for determination:

(a) whether there was union busting by RHB Bank when RHB Bank implemented the new regrading structure and new salary structure exercise by changing the new grade of executive from the old grade executive 1–4 to the new grades R1–R6; and

(b) whether RHB Bank discriminate the members of the union and the union's committee by implementing the new regrading structure and the new salary structure.

Issue (i): Whether the bank's action fall within ss 4, 5 or 7 of the IRA 1967

[22] In the present application, the Minister had referred the case to the Industrial Court pursuant to s 8 of the IRA 1967, and the Minister's reference reads as follows:

> Bahawasanya selepas menimbangkan laporan Ketua Pengarah Perhubungan Perusahaan Malaysia atas pertikaian di antara RHB Bank Berhad dengan Kesatuan Eksekutif RHB Bank mengenai Union Busting setelah majikan membuat perubahan gred dari Eksekutif 1 hingga 4 kepada Eksekutif R1 hingga R6 serta diskriminasi terhadap ahli-ahli dan pegawai kesatuan, saya berpuas hati bahawa adalah expedient bagi pertikaian ini dirujuk ke Mahkamah Perusahaan dan pada menjalankan kuasa- kuasa yang diberi oleh Seksyen 8(2A) Akta Perhubungan Perusahaan 1967, saya dengan ini merujukkan pertikaian ini ke Mahkamah Perusahaan.

[23] Section 8(1) of the IRA stipulates as follows:

> *Any complaint of any contravention of sections 4, 5, or 7* may be lodged in writing to the Director General setting out all the facts and circumstances constituting the complaint. (Emphasis added.)

[24] Therefore, for the union's claim on union busting and discrimination to be sustainable, it would be incumbent upon the union to prove its case under either of the ss 4, 5 or 7 of the IRA 1967, which provides as follows:

> 4 Rights of workmen and employers.
>
> (1) No person shall interfere with, restrain or coerce a workman or an employer in the exercise of his rights to form and assist in the formation of and join a trade union and to participate in its lawful activities.
>
> (2) No trade union of workmen and no trade union of employers shall interfere with each other in the establishment, functioning or administration of that trade union.
>
> (3) No employer or trade union of employers and no person acting on behalf of such employer or such trade union shall support any trade union of workmen by financial or other means, with the object of placing it under the control or influence of such employer or such trade union of employers.
>
> 5 Prohibition on employers and their trade unions in respect of certain acts
>
> (1) No employer or trade union of employers, and no person acting on behalf of an employer or such trade union shall —

(a) ... ;

(b) ... ;

(c) discriminate against any person in regard to employment, promotion, any condition of employment or working conditions on the ground that he is or is not a member or officer of a trade union;

(d) ... ;

(e) induce a person to refrain from becoming or to cease to be a member or officer of a trade union by conferring or offering to confer any advantage on or by procuring or offering to procure any advantage for any person.

7 Prohibition on workmen and their trade unions in respect of certain acts

No workman or trade union of workmen and no person acting on behalf of such trade union shall —

(a) ...

(b) ...

(c) induce any person to refrain from becoming or cease to be a member or officer of a trade union by conferring or offering to confer on any person or by procuring or offering to procure any advantage.

[25] I am therefore of the considered opinion that based on the Minister's order of reference, the Industrial Court ought to have asked itself the following questions:

(a) in respect to s 4(1) of the IRA 1967, whether the actions of the Bank tantamount to a 'restrain or coerce a workman or an employer in the exercise of his rights to form and assist in the formation of and join a trade union and to participate in its lawful activities';

(b) in respect of the application of s 5(1)(c) of the IRA 1967, whether the actions of the bank tantamount to 'discriminating against any person in regard to employment, promotion, any condition of employment or working conditions on the ground that he is or is not a member or officer of a trade union';

(c) with regards to the application of s 5(1)(e) of the IRA 1967, whether the actions of the bank tantamount to 'inducing a person to refrain from becoming or to cease to be a member or officer of a trade union by conferring or offering to confer any advantage on or by procuring or offering to procure any advantage for any person'; and

(d) with regards to the application of s 7(c) of the IRA 1967, whether the actions of the bank tantamount to 'inducing any person to refrain from becoming or cease to be a member or officer of a trade union by

A conferring or offering to confer on any person or by procuring or offering to procure any advantage'.

[26] In the award, the Industrial Court has held that the union's case is premised of ss 4(1), 5(1)(c) and (1)(e) of the IRA 1967:

B The Unions complaint in this case is that the Bank has by its actions contravened sections 4(1), 5(1)(c) and (1)(e) of the IRA 1967.

[27] However, I am of the considered opinion that the Industrial Court has C made an error in its finding as the union's pleaded case is limited to s 5(1)(c) and (1)(e) of the IRA 1967, as can be seen from para 11 of the union's statement of case:

D 11. Such action by the Employer by giving promotion and giving higher adjustment of salary to the Executive grade E1 amounted to discrimination to the other members and *against the provision of Section 5(1)(c) and (1)(e) Industrial Relations Act 1967*. (Emphasis added.)

[28] Therefore, when the Industrial Court made a finding that the union's E claim is also premised on s 4(1) of the IRA 1967, this clearly shows that the Industrial Court had failed to confine itself to the pleadings, and by venturing into non-pleaded issue, the Industrial Court had erred in law and/or jurisdictional error. In *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1, the Federal Court held as follows:

F The Industrial Court, like the civil courts must confine itself to the four corners of the pleading. This had been held to be so by this court in *Rama Chandran* which are as follows:

G It is trite law that a party is bound by its pleadings. The Industrial Court must scrutinise the pleadings and identify the issues, take evidence, hear the parties' arguments and finally pronounce its judgment having strict regards to the issues.

There is no reason to depart from the above view. Pleadings in the Industrial Court are as important as in the civil courts. The appellant must plead its case and the *Industrial Court must decide on the appellant's pleaded case* ...'. (Emphasis added.)

H

[29] In any event, in the award the Industrial Court then held that the union had proven its allegations of union busting and discrimination:

I Based on the totality of the evidence adduced, the union has succeeded in proving on a balance of probabilities the allegations of union busting and discrimination. The court has made its unanimous decision in accordance with equity, good conscience and having regard to the substantial merits of the case.

[30] Although the Industrial Court has made reference to ss 4(1), 5(1)(c) and (1)(e) of the IRA 1967, the Industrial Court had erred in law when it failed

to make any specific finding or determination as to whether the actions of the bank came within the purview of the mandatory and substantive elements of said statutory provisions. The Industrial Court merely made a finding of union busting and discrimination without any analysis of the elements in ss 4(1) and 5(1)(c) and (1)(d). I am therefore of the considered opinion and I agree with the bank that the Industrial Court had failed to make any specific finding or reasoning as how and why the bank's actions amounted to a breach of the specific sections, namely ss 4(1), 5(1)(c) and (1)(d) or 7(c) of the IRA 1967.

Issue (ii): Whether there is any evidence to prove that the alleged actions of the bank resulted in a breach of ss 4(1), 5(1)(c) and (1)(d) of the IRA 1967

[31] In the award, the Industrial Court held that the bank had engaged in union busting and discrimination on the basis that there were many instances where the junior executive in the lower grade received a higher salary adjustment or increment compared to the senior executive in the higher grade, as follows:

(a) at p 17 of the award:

> Based on the above comparisons, clearly there is a vast difference between the executives. There are many instances where the junior executive in the lower grade received a higher salary adjustment or increment compare to the senior executive in the higher grade.

(b) at p 18 of the award:

> UW-4 evidence clearly shows that the Bank's regrading structure was flawed and without any justification for the discrimination of salary between the executives. Azilah bte Ibrahim who was reporting to COW-4 was given a high increment of RM740.00 and thereby moving here salary to RM4,420.00, a difference of only RM320.00 between UW-4 who is her Superior Officer.

(c) at pp 20–21 of the award:

> Therefore clearly the motive of the implementation of the new Re-Grading Structure and new Salary Structure is to discourage the executives from joining the union ...
>
> Majority junior executives received either higher increment, salary adjustment or even salary compare to senior executives.

[32] The above findings are based on the evidence of COW1, the President of the union and other union officials. The evidence of COW1 reads as follows:

> Q9: Apakah yang Majikan lakukan bagi perubahan gred-gred tersebut?
>
> A: Pertama, *Majikan telah melaksanakan pengecilan skop Kesatuan dengan memecahkan dari gred E1 hingga E4 kepada R1 hingga R6 di mana diwujudkan 2 gred yang baru berbanding dengan gred yang asal.*

Kedua, *Majikan juga telah memberikan kenaikan gaji/pelarasan yang tinggi kepada eksekutif gred E1 sahaja yang menyebabkan ramai eksekutif yang telah mendapatkan kenaikan gaji yang tinggi enggan meneruskan keahlian mereka dengan kesatuan.*

Q20: Kenapa Kesatuan mendakwa wujudnya 'union busting'?

A: Terdapat dua keadaan di sini di mana Kesatuan mendakwa terdapatnya Union Busting?

Yang pertamanya RHB Bank mendakwa bahawa akan memperkenalkan 'The new RHB grading structure (RGS) sejak tahun 2007 tetapi tidak pernah memaklumkan kepada kakitangan apakan bentuk RGS ini. Apabila Kesatuan telah didaftarkan pada bulan Mac 2011, RHB terus melaksankan RGS ini pada bulan Mei 2011.

Yang *keduanya Kesatuan akan mendakwa bahawa kaedah ini digunakan untuk memecahkan ahli-ahli Kesatuan dengan memberikan kenaikan gaji tidak sekata antara kakitangan terutamanya yang telah mendaftar untuk menjadi ahli Kesatuan.*

Q22: Apakah tindakan diskriminasi dari Majikan yang kami dakwa ini?

A: *Tindakan Majikan menaikkan pengkat dan memberikan pelarasan gaji yang tinggi kepada sebahagian eksekutif gred E1 yang baru berkhidmat dengan RHB Bank Bhd merupakan diskirminasi kepada sebahagian ahli yang lain terutama kakitangan RHB Bank yang juga ahli Kesatuan yang telah berkhidtmat lebih lama di RHB Bank Bhd.* (Emphasis added.)

[33] However, I am of the considered opinion that under s 5(1)(c) and (1)(e) of the IRA 1967, it is incumbent on the union to establish that there was a different treatment between union members and non-union members. However, no evidence was led by the union in the Industrial Court to prove who were the members of the union and who were not. The union did not produce its membership list to prove employees who were its members. This was in fact conceded by the union. In his evidence, the union's first witness UOW1 admitted that the bank did not have any information or knowledge on who amongst the employees of the bank were members and non-members of the union:

Q7: Setuju dengan saya sehingga bulan Mei 2011, *Bank masih tidak tahu siapa yang menjadi ahli Keepers dan siapa pegawai yang tidak menjadi ahli?*

A: *Setuju*.

...

Q25: *Setuju dengan saya ahli yang kononnya tidak bayar yuran tidak dikemukakan kepada mahkamah yang mulia ini?*

A: *Setuju.*

...

Q28: *Di dalam keadaan di sini, setuju dengan saya tiada kekurangan kehahlian dalam Kesatuan?*

A: *Setuju.*

...

Q29: Ada *apa-apa bukti untuk menyokong jawapan kamu bahawa kononnya 500 ahli E1 enggan meneruskan keahlian?*

A: *No*. (Emphasis added.)

[34] Another witness for the union, OUW2 gave the following evidence:

Ok sekarang ni kita dalam bank *kita tak tahu berapa ramai kategori eksekutif E1 tu kita tak ada data pada kita*; pada kita hanya ahli sahaja jadi *kita tak boleh nak determine sama ada yang bukan ahli tu dapat banyak atau dapat sikit*. (Emphasis added.)

[35] This corroborates the evidence of the bank's witnesses that the bank did not at any point in time know which employees had joined the membership of the union and which employee did not. In other words, the bank did not know who were the union members. Therefore, there cannot be a union busting if the bank itself did not know who were the members of the union. Indeed, both COW1 and COW2 confirmed that the bank did not know those employees were members of the union and those that were not, as follows:

(a) COW1 gave the following evidence:

The Bank does not even know who are members of the Union and who are not as the Union has not been recognised by the Bank. So how could the Bank pay Union members lower salary. The Union has no basis whatsoever to allege this.

(b) COW2 gave the following evidence:

Q: *At the time the officers and executives were assigned to their respective new salary, did the Bank know or consider whether or not the officer or executive was a member of the Union*?

A: *No, we did not even know who were members of the Union or not.* I myself did not even know of the existence of the Union at that time. (Emphasis added.)

[36] Therefore, I am of the considered opinion that the union had failed to adduce evidence to show that union members were indeed induced to cease to be members of union due to the regrading structure and the new salary structure. The Industrial Court had therefore erred in law as its conclusion on union busting is not supported by any evidence. In his evidence, UOW1 said as follows:

Q19: Setuju atau tidak *Kesatuan juga tidak kemukakan kepada mahkamah senarai ahli yang membayar yuran bulanan kepada Kesatuan.*

A: *Setuju*

Q20: Setuju atau tidak *Kesatuan juga tidak kemukakan nama-nama ahli yang kononnya enggan meneruskan keahlian dengan Kesatuan setelah mendapat gaji baru*?

A: *Setuju*. (Emphasais added.)

[37] However, the union took the position that there was union busting because the collection of fees from the union members had decreased after the implementation of the new regrading structure and salary structure. This argument was accepted by the Industrial Court at p 22 of the award:

> UW-2 also gave evidence that the union's members were not satisfied when the union were unable to have a meeting with the management of the bank and could not explain to its members pertaining to the reasons of implementing the new Re-Grading Structure and new Salary Structure. This has discouraged the union members from continuing their membership. *UW-2 gave evidence that the collection of fees from the union members had slopped down after the implementation of the new Re-Grading Structure and new Salary Structure. The graph and the statistic produced by the union clearly supports the union's contention.* (Emphasis added.)

[38] I am of the considered opinion and I agree with the bank that the Industrial Court had erred in law when it took into account the irrelevant consideration on the purported decrease in the collection of union membership fees. This is because the Industrial Court had failed to appreciate that the decrease in the collection of union fees did not automatically signify a corresponding decrease in the union membership. Collection of union fees and union membership are two separate and distinct matters. In this respect, the union's witness, UOW1 had admitted during cross-examination that the increase in membership fees during the initial period was due to lump sum payment of membership fees for one year or six months in the beginning:

> Q: Setuju dengan saya *untuk bulan Mac 2011, ada ahli yang bayar yuran untuk 6 bulan atau 1 tahun sekali gus at one go*?
>
> A: *Setuju*
>
> Q: Setuju dengan saya *sebab Kesatuan baru ditubuhkan jadi yuran masuk (entrance fee) dan yuran tahunan untuk bulan Februari dan Mac, April, Mei adalah lebih tinggi berbanding bulan-bulan seterusnya.*
>
> A: *Setuju* (Emphasis added.)

[39] I am of the considered opinion and I agree with the bank that the only legal document to prove union membership is the union's membership register. However, the Industrial Court failed to appreciate that that in this case, the union had failed to produce its membership register to show the actual number of members who resigned or left the union after the salary revision.

[40] Therefore, I find that there is no evidence before the Industrial Court to prove that there was a different treatment between union members and non-union members and that the union members had left the membership of the union as a result of the bank's actions.

Issue (iii): Whether there had been discrimination against members of the union

[41] On the issue of discrimination, the Industrial Court ruled that there was discrimination against members of the union and that the bank had contravened ss 4(1), 5(1)(c) and (1)(e) of the IRA 1967. In the award, the Industrial Court held as follows:

> UW2, the union secretary gave evidence that based on the complaints by its members, the union had collected all letters dated 13 May 2011 and conducted comparison of the promotion, increment and salary adjustment based on the new regrading and new salary structure and thereafter prepared the graph to prove discrimination between members and non-members and also among the grades of executives.
>
> From the evidence produced in Court it is obvious that there are inconsistencies in giving the increment and market alignment between the Executives. Clearly junior Executives grades 1 and 2 received higher increment compared to senior executives grade 1 and 2 and also executives grade 3 and 4.

[42] The Industrial Court's finding is based on the evidence of UW3 and UW4, which are as follows:

(a) evidence of UW3:

> Q. Adakah terdapat diskriminasi di dalam penstrukturan gaji ini?
>
> A. Ya. Saya mendapat kenaikan gaji yang kecil walaupun saya bergred R4. Ada kakitangan di bawah saya yang berkhidmat di RHB kurang daripada saya mendapat gaji yang lebih tinggi. Sebagai contoh MohdRaud bin Omar bergred R2 yang lebih junior mendapat gaji sebanyak RM4890.00 setakat 1.5.2011.

(b) evidence of UW4:

> Q. Adakah terdapat diskriminasi di dalam penstrukturan gaji ini?
>
> A. Ya. Saya mendapat kenaikan gaji yang kecil. Ada kakitangan di bawah saya yang berkhidmat di RHB kurang daripada saya mendapat gaji yang lebih tinggi. Sebagai contoh Azila bte Ibrahim yang lebih junior di jabatan saya dan gred R1 mendapat gaji sebanyak RM4,420.00. Gaji beliau pada 31.12.10 ialah sebanyak RM3,680.00 manakala gaji saya pada 31.12.10 ialah sebanyak RM4,645.00. Surat RHB Bank Bhd kepada Puan Azila bt Ibrahim boleh dilihat dimukasurat 25A Ikatan Dokumen Tambahan. Kenaikan gaji Azila ialah sebanyak RM740.00 manakala kenaikan gaji saya adalah sebanyak RM95.00 sahaja.

[43] However, in order to constitute an actionable form of discrimination under s 5(1)(c) of the IRA 1967, it is incumbent on the union to establish that there is discrimination 'against any person in regard to employment, promotion, any condition of employment or working conditions on the

ground that he is or is not a member or officer of a trade union'.

[44] Bearing in mind that the bank did not have any knowledge as to who were members of the union, the bank's regrading and new salary structure cannot be targeting the union members. The union's evidence, at best, merely indicates that certain employees from one or two grades received higher increments compared to employees from other grades. There was no evidence to show that the members of the union collectively received lower increments compared to non-union members.

[45] The Industrial Court had also premised its decision on the union's allegation that the bank had promoted four officials of the union to grade R3 to disqualify them from being a member of the union:

> Evidence had been adduced in Court that the bank had purposely promoted 4 officials of the union who were executives grade E2 to grade R3 without giving them a fair and reasonable salary adjustment or increment when the bank implemented the new re-grading structure and the new salary structure. The purpose of the promotion was to disqualify them from being a member in the union, because the bank alleged grade 3 and grade 4 executive cannot become a member of the union.

[46] However, I agree with the bank that in making the above finding, the Industrial Court had failed to consider the following relevant considerations:

(a) that it failed to appreciate that the said officials had accepted the promotions without any objections;

(b) that it failed to appreciate none of the said officials came to court to testify that the promotion was to disqualify them from being union members;

(c) that it failed to appreciate that none of the said officials testified in court to state that they were not satisfied with their salary adjustments upon promotion; and

(d) that it failed to appreciate that promoting union members to a higher ranking per se, does not constitute discrimination or union busting.

[47] In the premise, I find that the Industrial Court had erred in law as it failed to appreciate the legal requirement in s 5(1)(c) of the IRA 1967, that is, there must be evidence of discrimination in the salary structure and the promotion 'on the ground that he is or is not a member or officer of a trade union'. As the evidence shows that the bank did not have any knowledge as to who were members of the union, the bank's re-grading and new salary structure cannot be said to be targeting the union members. The re-grading and new salary structure was done across the board within the RHB Group of Companies.

Issue (iv): Consultation and limited recognition

[48] The Industrial Court's finding on union busting is also based on the union's compliant that the bank had refused to meet the union. At pp 22–23 of the award, the court held:

> UW1 and UW2 testified that the bank refusal to meet on the implementation of the new structure, the union could not explained to its members the rationale of the implementation of the new re-grading and salary structure. The court is of the view that the refusal of the company to meet the union due to non-recognition of the union clearly breached the union's right to bring issues that involved its members right and is unjustified. Once the union have been registered legally, it has a 'limited recognition' that enable them to act on behalf of the members in grievances issues.
>
> This has been decided in the case of *Kesatuan Eksekutif RHB Bank Bhd v RHB Bank Bhd* [Award 700 of 2016] ...

[49] However, Award No 700 of 2016 had since been quashed by the High Court on 15 August 2017 in Application for Judicial Review Case No 25–162–09 of 2016, which held that there is no such thing as 'limited recognition' under s 9 of the IRA 1967. Under s 9, there can only be 'a recognition' or 'no recognition' of the trade union concerned.

[50] With regards to the issue of consultation, the bank takes the position that it did not meet the union because the issue of union recognition was pending and that the bank did not grant recognition to the union. In any event, I agree with the bank that the issue of recognition is a separate issue from union busting, and that there is no legal requirement in ss 4 or 5 of the IRA 1967 which mandates the bank to consult the union which had not been duly recognised at the relevant time.

CONCLUSION

[51] Premised on the reasons enumerated above, I find that there is merit in the application as the Industrial Court had failed to appreciate the elements to be established in ss 4(1) and 5(1)(c) and (1)(e) of the IRA 1967. Added to that the findings of the Industrial Court are not supported by the evidence before it, and that it had failed to consider relevant consideration or had taken irrelevant consideration. In the premise, the bank's application is allowed and the award is hereby quashed.

Application allowed.

Reported by Ahmad Ismail Illman Mohd Razali